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Supreme Court, U.S.
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No----------

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOHNNY W. MOSES, FRANCES G. MOSES AND J & F ENTERPRISES, INC. a Alabama corporation,

Petitioners

BUSINESS CARD EXPRESS, INC., a Michigan corporation, GREGORY S. DERRY individually and as an agent of BCE. DENNIS PHILLIPS individually and as an agent of BCE AMERICAN SPEEDY PRINTING CENTERS, INC. a Michigan corporation, ANDREW PETRESS individually and as an agent of both American Speedy Printing Company and Business Card Express, Inc.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners JOHNNY W. MOSES, FRANCES MOSES AND J & F ENTERPRISES INC. an Alabama Corporation; petition for a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit entered on April 8, 1991, and the Transfer Order of United States District Court For The Northern District of Alabama, entered on July 10, 1989.

QUESTIONS PRESENTED

1. Whether the Alabama District Court was clearly erroneous where it treated the forum selection clause as dispositive of the transfer issue, where it ignored and thereby altered the standard established and required by Congress under 28 U.S.C. 1404(a) in transferring the case to Michigan

2. Whether Petitioner was denied the right of review, where the Alabama District court hastily transferred the case, ignored plaintiffs' timely request for an interlocutory appeal, and held it was without jurisdiction to consider plaintiff's timely filed motion for reconsideration; where the Michigan District Court and the Sixth Circuit Panel also held they had no jurisdiction to review the transfer order of the Alabama District Court.

3 Whether the Michigan District Court and the Sixth Circuit Panel were clearly erroneous in holding that the choice of law provision in the contested agreement applies to plaintiff's claims of fraud and misrepresentation.

PARTIES TO THE PROCEEDINGS

All named parties to this proceeding are listed in the caption of this petition.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at ___ F. 2d ___ and can be found in the appendix to this petition at 1a. A Petition for Rehearing out of time was filed, however, the court has not ruled.

The Opinion of the United States District Court For The Northern District of Alabama is reported at_____ F. Supp_____ and can be found in the appendix to this petition at 41a.

JURISDICTION

The Court of Appeal's decision of which review is sought was issued on April 8, 1991. A Stay of mandate was granted until June 17, 1991, contingent upon filing of the petition for writ of certiorari. The decision of the United

States District Court for the Northern District of Alabama was issued on July 10, 1989.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (1).

STATUTORY PROVISIONS INVOLVED

Section 28 U.S.C. 1404 states as follows:

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which

pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

(d) As used in this section, "district court" includes the United States District Court for the District of the Canal Zone; and "district" includes the territorial jurisdiction of that court.

Section 28 U.S.C. 1294(1) states as follows:

Appeals from reviewable decisions

of the district and territorial courts shall be taken to the court of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;

STATEMENT OF THE CASE

On June 24, 1986, Defendant Business Card Express (hereinafter BCE) sold the exclusive right to open a BCE franchise in Tennessee and Alabama to a a third party of Nashville, Tennessee. In December of 1987, defendant BCE purported to sell the same exclusive right to operate a BCE franchise in the State Alabama to the Plaintiffs. The latter paid $48,500 for said "exclusive" franchise. The exclusive right to establish a BCE franchise in Alabama previously sold to the Nashville third party did not end until February of 1989, after this cause was filed.

On October 19, 1988 Appellants, filed the complaint initiating this cause in the United States District Court for the Northern District of

Alabama. Pursuant to the Second Amended Complaint, filed on June 30 1989, plaintiff charged Misrepresentation, Deceit, Suppression of Material Facts, Violation of The Deceptive Trade Practices Act (all of which are statutory claims under Alabama law) and Conspiracy to Defraud, a common law claim.

On December 1, 1988, defendants-appellees, filed a Motion To Dismiss or in the Alternative to Transfer. Plaintiff filed a memorandum in opposition. Defendants Motion to Dismiss was denied on May 5, 1989. On July 10, 1989, the Alabama District Court granted the motion to transfer. The next day, plaintiff filed a Motion for Reconsideration and supporting brief. Plaintiff also requested the

court certify the issues for an interlocutory appeal pursuant to 28 U.S.C. Section 1292(b), however, the District court did not respond to that request.

By Order of July 12, 1989, the Alabama District Court held it lacked jurisdiction to entertain the motion to reconsider. At the time the court determined it lacked jurisdiction, the files were still in the custody of the Alabama District Court Clerk. Notice of Transfer to Michigan did not occur until July 17, 1989.

Upon transfer to the Michigan District Court, defendants filed a motion and brief for summary judgment and plaintiffs responded in opposition. Plaintiffs next filed a motion to re-transfer. On March 15, 1990, the

Michigan District Court denied the motion to re-transfer and motion for reconsideration. On March 16, 1990, the Court Granted Defendant's motion for Summary Judgment and entered judgment for defendants. A motion for reconsideration was denied on March 30, 1990. Notice of Appeal followed on April 26, 1990.

The Sixth Circuit panel affirmed on April 8, 1991, plaintiff next filed a Motion To Stay the court's mandate pending application for Writ of Certiorari and a petition for rehearing followed. The stay of mandate was granted, however, the court has not ruled on the petition for rehearing.

REASONS FOR GRANTING THE PETITION

I

In transferring the case to Michigan, the Alabama district court indicated that it felt compelled by the Eleventh Circuit's response to Stewart Organization v. Ricoh Corp., 487 U.S. 22,32 (1988) to transfer the case.* The district court stated:

> "Instead of recognizing a forum selection clause as only one fact, among others, to be weighed by the trial court, as the Supreme Court held, the Eleventh Circuit has, as a practical matter, made the clause the overriding consideration. It became the controlling criterion because there was nothing recognized which can outweigh it. "

That is not the standard established by Congress and mandated by

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The Eleventh Circuit opinion referred to is In re Ricoh Corp., 870 F.2d 570 (11th Cir. 1989)

this Court in Stewart Organization v. Ricoh Corp., id. The District court's decision is all the more glaring when one considers the fact that it found the plaintiff's lacked the ability to litigate in Michigan:

> "The court regrets the fact that Mr. Moses, et. al., will not only be inconvenienced by having to go to Michigan, but will, in all likelihood, be financially unable to do it. There is no doubt that the order transferring CV 88-AR-1745-S to Michigan will, as to Mr. Moses and his partners be like transferring them to the moon or to the bankruptcy court."

The Alabama district court did not have the discretion to ignore the 1404 factors established and required by Congress and reaffirmed by this court. The district court did so knowing its action was contrary to law and said so in its opinion.

Where the Supreme Court of the

United States has clearly established legal principles in dealing with subject matter in litigation, Court of Appeals, (and presumably District courts), must apply the law in effect at the time of its decision. Tomlinson v. Miles, 316 F.2d 710, (5th Cir. 1963) cert. denied 84 S.Ct. 71; Spokane County v. Air Base Housing Inc., 304 F.2d 494 (C.A. Wash. 1962); U.S. for Heydt v. Citizens State Bank, 668 F.2d 444 (C.A.N.D. 1982) General Beverage Sales Co. v. East Side Winery, 568 F.2d 1147 (C.A. WIS. 1978) U.S. V Fitzgerald, 545 F.2d 578 (C.A. Ind. 1976)

II

Where the Sixth Circuit panel adopted the transfer effected upon said clearly erroneous grounds as the law of the case, the panel necessarily adopted

the clear error of the Alabama District Court. The adoption of this clear error also resulted in manifest injustice in that the Alabama and Michigan courts denied plaintiff the right of review allowed by Rules 59 and 60 of the Federal Rules of Civil Procedure and 28 U.S.C. 1292(b).

One day after the Alabama court ordered the transfer plaintiff moved for reconsideration and for an interlocutory appeal. The Alabama court held it lacked jurisdiction to reconsider once the transfer was effected and ignored the request for an interlocutory appeal. In Roofing & Sheet Metal Serv v. La Quinta Motor Inns, 689 F.2d 982 (11th Cir.1982) the court stated:

> "When the files in a case are physically transferred to the transferee district, the

> transferor court loses all jurisdiction of the case.(citations omitted) -- In these circumstances, a mandamus action against the transferring judge would be futile exercise. For this reason the prevailing approach is to delay the physical transfer of the papers in a case long enough to allow an aggrieved party the opportunity to file a petition for mandamus." Roofing & Sheet Metal Serv. at at 988, 989 note 10.

Plaintiff in this case was denied that opportunity by the hasty transfer.

Pursuant to Roofing supra, "Several circuits have suggested that a motion to retransfer in the transferee court is an appropriate means of preserving for appeal any objection to a transfer between circuits." (citations omitted) Roofing, at 989.

Upon transfer, plaintiff filed a motion for reconsideration in the hope of preserving for appeal objections to

the transfer between circuits. The Michigan District Court held it did not have the authority to review the transfer order of a collateral court and confined itself to objections not considered by the Alabama judge. The Sixth Circuit panel, likewise, held it lacked jurisdiction to review the transfer order. Review by the panel was generally limited to decision made by the Michigan District court. However, in conflict with its stated position regarding jurisdiction and the law of the case doctrine, the panel made findings of fact contrary to that previously found by the Alabama District court with respect to plaintiff's lack of sophistication and lack of funds to litigate in Michigan.

The concerns raised by the Sixth

Circuit Panel and the Michigan District court regarding jurisdiction are substantial. Section 28 U.S.C. 1294 appears to limit the jurisdiction of the the courts of appeals to review of decisions of district courts embraced by that circuit. Similarly, district courts generally have no authority to review decisions of collateral courts. The result, however, for litigants in plaintiff's posture, is a judicial limbo, an egregious no man's land with a wrong without a remedy.

Not surprisingly, there is conflict among the circuits on this question. The following courts have held that the transfer order is not reviewable by the transferee court: Starnes v. McGuire, 512 F.2d 918 (DC Cir. 1974); Linnel v. Sloan, 636 F.2d 65

(4th Cir. 1980); In re Southwestern Mobile Homes, Inc. 317 F.2d 65 (5th Cir. 1963); Mc George v. Continental Airlines, Inc., 871 F.2d 952 (10th Cir. 1989); Roofing & Sheet Metal Services, Inc. v. La Quinta Motor Inns, 689 F.29 982 (11th Cir. 1982); Technitrol, Inc. v. Mc Manus, 405 F.2d 84 (8th Cir. 1968) The Fifth Circuit seems to have made an exception for cases transferred into a district by the multidistrict litigation panel. See Astarte Shipping v. Allied Steel & Export Service, 767 F.2d 86 (5th Cir. 1985) and in the context of bankruptcy, See. Landnwehr v. United States (In re Miller), 485 F.2d 74 (5th Cir. 1973) The Ninth and Second Circuits take the position that the transfer order is reviewable. See Danner v. Himmelfarb 858 F.2d 515 (9th

Cir. 1988); Am. Fid. Fire Ins. v. U.S. Dist. Ct. For N.D. CaL., 538 F2.Dd 1371 (9th Cir. 1976); Magnetic Eng'g & Mfg. Co. v. Dings Mfg. Co., 178 F.2d 866 (2d Cir. 1950).

In Danner, supra, the Court quotes the Judicial Panel on Multi District Litigation:

> On change of venue the overwhelming authority holds that the jurisdiction and powers of the transferee court are coextensive with that of the transferor court; that the transferee court may make any order to render any judgment that might have been rendered by the transferor court in the absence of transfer. Danner at 521

Section 28, U.S.C. 1407, the statute authorizing multidistrict litigation, does not appear to expand the jurisdictional limitations of appellate or district courts; rather it provides a mechanism for

coordinated and or consolidated proceedings in various districts. Yet there clearly appears to be a conflict in the way transfers under Section 1404 and 1407 are treated.

Finally, this court, in apparent agreement with the view that the transfer order is reviewable, held in Christianson v. Colt Industries Operating Corp., 108 S.Ct. 2166 (1988):

> A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should loathe to do so in the absence of extraordinary circumstances such as where the initial decisions was clearly erroneous and would work a manifest injustice. Christianson at 2178

It is inconceivable that Congress would have intended 28 U.S.C. 1404 and 28 U.S.C. 1294(1) to operate in a

manner that would divest both the transferee and transferor courts of jurisdiction to consider issues in a pending case; one or the other must have jurisdiction. If the transferor court loses jurisdiction upon transfer then jurisdiction over all issues must lie in the transferee court.

II

The Sixth Circuit's affirmance of of the trial court's decision regarding the choice of law provision and the grant of summary judgment in this case is directly in conflict with the Fifth Circuit's decision in Caton v. Leach Corp., 896 F.2d 939 (5th Cir. 1990)

In Caton, The dispute centered, in part, upon the application of Texas or California Law. The parties choice

of law clause provided that: **"[t]his Agreement shall be construed under the laws of the State of California."** The court held that the narrow choice of law clause did not address the entirety of the parties' relationship. The choice of law provision, said the court, did not apply to plaintiff's tort claims. Caton at 943 The panel contrasted the provision at issue with with broad clauses, which choose a particular state's law to "govern, construe and enforce all of the rights and duties of the parties arising from or relating in any way to the subject matter of this contract." Caton at 943 n.3.

The choice of law provision in this case is virtually

indistinguishable from that at issue in Caton and compels the same result.

The instant clause states: **"This Franchise and License Agreement and the construction thereof shall be governed by the laws of the State of Michigan."** Plaintiff submits that construction relates only to interpretation of ambiguous provisions. 'Agreement' refers to contractual claims arising out of the agreement. These inferences are reasonable and justifiable.

Any construction of the disputed provision requires that the court infer the intent of the parties at the time the agreement was allegedly entered. The choice of law clause does not contain any language by which one can construe that it applies to

tortuous conduct such as the tort duty of good faith and fair dealing which do not arise out of the contract. Under these circumstances, and, particularly on Motion for summary judgment, the Michigan district court and the Sixth Circuit panel were bound to accept the evidence of the non-movant, and all justifiable inferences are to be drawn in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, (1986)

Where the choice of law provision does not reach the tort claims the Sixth Circuit panel was bound to apply the law of Alabama law pursuant to Van Dusen v. Barrack, 376 U.S. 612 (1964) Such a result is also consistent with Michigan law which looks to the place

of injury to determine if there is a cause of action for injury to the person or property. See Parets v. Eaton Corp., 479 F.Supp.512 (D.C. Mich. 1979); Papizzoo v. O. Robertson Transport, Ltd., 401 F.Supp. 540.(D.C. Mich. 1975)

CONCLUSION

The petition for writ of certiorari should be granted to correct clear error and manifest injustice where the Alabama district court's transfer order is contrary to the letter and spirit of the Congressional mandate under 1404; The petition should be issued to clarify the courts jurisdiction upon transfer and spare litigants the oblivion and injustice which results when the transferor and transferee courts indicate they have no jurisdiction to

review a transfer order. The issue is of grave importance to future litigants and to the court's because it exposes fully a lingering peril which is likely to re-occur. Finally, the petition should be granted to resolve the conflict between the Fifth and Sixth Circuit regarding the choice of law provision and to correct a clear departure from the long established inference accorded non-moving parties on motion for summary judgment.

Respectfully submitted,

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June 14, 1991

No. 90-1496

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHNNY W. MOSES and
FRANCES G. MOSES,

Plaintiffs-Appellants,

v.

ON APPEAL from the United States District Court for the Eastern District of Michigan

BUSINESS CARD EXPRESS, INC., a Michigan Corporation; GREGORY S. DERRY, individually and as an agent of the BCE; DENNIS PHILLIPS, individually and as an agent of the BCE; AMERICAN SPEEDY PRINTING CENTERS, INC., a Michigan corporation; ANDREW PETRESS, Individually and as an agent of both American Speedy Printing Centers and Business Card Express,

Defendants-Appellees.

Decided and Filed April 8, 1991

Before: GUY and BOGGS, Circuit Judges, and LIVELY, Senior Circuit Judge.

LIVELY, Senior Circuit Judge, This appeal concerns the reviewability and validity of forum selection and choice of law clauses in a franchise agreement. More specifically, the plaintiffs-appellants contend that a district court erroneously transferred the case to another district designated in the contractual forum selection clause. The clause was contained in a contract which the plaintiffs-appellants allege they signed in reliance on the defendants-appellees' fraud, misrepresentation and deceit. In addition, they argue that the transferee court erred in granting summary judgment to the defendants-appellees on the basis

of the choice of law clause.

I.

A.

The plaintiffs, Johnny and Frances Moses, husband and wife, are residents of Alabama. Following some preliminary negotiations, the plaintiffs entered into a franchise agreement with the defendant, Business Card Express, Inc. (BCE), a Michigan corporation. The agreement granted the plaintiffs an exclusive 20 year franchise to use BCE's trademarks and "know how" in the operation of an enterprise printing and selling business cards in Alabama. The 24-page agreement detailed the rights and obligations of the parties, and contained the following provisions concerning choice of law and forum:

This Franchise and License

> Agreement and the construction thereof shall be governed by the laws of the State of Michigan except that the law of the state where the Franchise Owner is located shall control as to terms of the non-competition provision and, if there is a statute so regulating , of termination and renewal procedures. Both parties acknowledge all litigation must be commenced in the federal district court for the Easter District of Michigan or the Michigan Circuit Court for the County of Oakland.

There appear to have been disagreements between the plaintiffs and various BCE representatives almost from the beginning of their relationship. Eventually, the plaintiffs notified BCE that they intended to rescind the agreement and demanded compensation for claimed losses. When no satisfactory response was forthcoming the plaintiffs filed this diversity action in the United States District Court for the Northern District of Alabama.

The defendants, in addition to BCE, are identified in the amended complaint as individuals who are agents of BCE and as a corporation (American Speedy Printing Company) that either owns or has a controlling interest in BCE. According to the complaint, both BCE and American Speedy are Michigan corporations, and the individual defendants, except Gregory S. Derry, are citizens and residents of Michigan. The complaint avers, "upon information and belief," that Derry is a citizen and resident of Canada.

After describing the dealings between the plaintiffs and the defendants, the complaint sets forth counts containing claims for compensatory and punitive damages. Four of the counts allege violations of

Alabama statutes establishing causes of action for misrepresentation, deceit and violation of the Alabama Deceptive Trade Practices Act. The remaining count charges a conspiracy to defraud.

An attorney accepted service of a summons, in Michigan, on behalf of all defendants. All defendants then filed a motion to dismiss the action for improper venue under 28 U.S.C. Section 1406(a) or, in the alternative, to transfer the case to the United States District Court for the Eastern District of Michigan pursuant either to 28 U.S.C. Section 1404(a) or 28 U.S.C. Section 1406(a). They filed a copy of the franchise agreement as an exhibit to their motion. The plaintiffs and defendants made a number of submissions, including affidavits, in opposition to

and in support of the motion to dismiss or transfer.

B.

The district court, Judge William M. Acker, Jr., entered an order staying the motion until the United States Court of Appeals for the Eleventh Circuit ruled on a pending petition for mandamus directed to Judge Acker in an unrelated case in which he had denied a request to transfer that case to another jurisdiction.

After the court of appeals granted the petition for writ of mandamus in the unrelated case, In re Ricoh Corp., 870 F.2d 570 (11th Cir. 1989), the district court entered an order on July 10, 1989, directing the clerk to transfer the present case to the United States

District Court for the Eastern District of Michigan. Judge Acker filed a memorandum opinion in which he stated that, in light of the decision of the court of appeals in Ricoh, he had no choice but to grant the motion to transfer the present case to Michigan. This conclusion was based upon the court of appeals' treatment of a forum selection clause in the franchise agreement involved in Ricoh.

Ricoh was also an action by a franchisee against a franchisor that was filed in Judge Acker's court. Although the franchise agreement contained a provision that any action over a dispute arising out of the contract could be brought only in a court located in the New York borough of Manhattan, Judge

Acker denied the defendant's motion to transfer the case to a court at that location. In an en banc decision, the court of appeals reversed denial of the motion for transfer. Stewart Organization, Inc. v. Ricoh Corp., 810 F.2d 1066 (11th Cir. 1987). Employing somewhat different reasoning, the Supreme Court affirmed the court of appeals and remanded the case "so that the District Court may determine in the first instance the appropriate effect under federal law of the parties' forum-selection clause on respondent's Section 1404(a) motion." Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22,32 (1988). Upon remand the district court again denied the motion to transfer, resulting in the mandamus decision previously referred to, 870 F.2d 570.

In his memorandum opinion granting the motion to transfer the present case, Judge Acker stated that he felt the court of appeals in Ricoh had misread the Supreme Court and had treated the forum selection clause as placing an "insurmountable burden of proof" on the plaintiffs in this case. Moses v. Business Card Express, Inc., (consolidated with Stewart v. Dean Michaels Corp.) 716 F.Supp. 1400 (N.D. Ala. 1989). Nevertheless, he was bound by the court of appeals' view of the law. The plaintiff filed a motion for reconsideration the next day, July 11, 1989, arguing that Ricoh was distinguishable because the plaintiff in that case did not show fraud, duress or misrepresentation, the very grounds upon which the plaintiff in this case sought

relief.

The district court denied the motion for reconsideration in an order entered the following day, July 12th. Judge Acker concluded that" [o]nce a transfer has occurred, the transferring court no longer has jurisdiction and cannot rule on a post-transfer motion which, if granted, would purport to wrest jurisdiction from the transferee court." The plaintiff did not file a petition for a writ of mandamus but did request the court to certify the issues for an interlocutory appeal pursuant to 28 U.S.C. Section 1292(b). The district court did not respond to that request. The clerk of the district court in Alabama forwarded the plaintiffs' motion for reconsideration with supporting papers to the district court of

Michigan.

II.

A.

The district court in Michigan, Judge George La Plata, first addressed the motion for reconsideration and a motion to retransfer the case to Alabama filed by the plaintiffs in the Michigan court. The court stated that once the files are physically transferred to the transferee court, the transferor court loses jurisdiction over the case. Judge La Plata stated further that neither he nor this court can rescind the transfer order. Thus, Judge La Plata denied the motion for reconsideration. The judge determined that he had the power to consider the motion to retransfer, but "where it is no more than an indirect

review of whether the decision to transfer the case was an abuse of discretion, the law-of-the-case doctrine should prevent the transferee court from redeciding the issue."

After reviewing applicable cases, Judge La Plata concluded that Judge Acker's decision to grant the motion to transfer the present case was "not a clearly erroneous application of Ricoh." Giving deference to Judge Acker's decision as the law of the case, Judge La Plata declined to review the decision to transfer for abuse of discretion. Nevertheless, Judge La Plata considered the issues raised in the plaintiffs' motion for reconsideration in view of the fact that Judge Acker's opinion did not deal with

them.[1] The court did not agree that the issues raised in the plaintiffs' motion required a retransfer of the case. Pertinent to our review, the court found that the forum selection clause in the franchise agreement was not rendered "a nullity" by the deceit, fraud and misrepresentation alleged to have been practiced by B.C.E. Judge LaPlata concluded that even if the plaintiffs were induced to enter into the agreement

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[1] Inasmuch as Judge Acker had declined on jurisdictional grounds to consider arguments made by the plaintiffs for the first time in their motion for reconsideration, Judge LaPlata responded to those arguments as well as to those made in the first instance. This eliminates any concern that might have arisen over whether the plaintiffs were denied consideration of all their arguments in opposition to the transfer due to the rapidity of the physical transfer of the file to Michigan.

by fraud, deceit and misrepresentation, this would not affect the validity of the forum selection clause. The plaintiffs did not claim that the inclusion of that clause in the contract was the product of a fraud.

B.

Following the district court's refusal to retransfer the case, the defendants made a motion for summary judgment. The parties had engaged in discovery while the case was stayed pending the Eleventh Circuit decision in Ricoh. On the basis of the entire record and briefs of the parties, the district court granted summary judgment in favor of the defendants and dismissed the action. The court held that the counts in the complaint based on alleged violations of Alabama statutes should be

dismissed because the choice of law provisions of the franchise agreement required the validity, interpretation and obligations of the contract to be governed by the law of Michigan. As to the remaining count, the court found that the defendants were legally incapable of committing a civil conspiracy because all of the defendants are a single entity in law. "[T]he defendants are a parent and subsidiary corporation, and three individuals who are allegedly agents of one or both of the corporations."

The plaintiffs appealed and the parties have argued the transfer issue as well as the summary judgment. The plaintiffs have abandoned their reliance on a claim of conspiracy and have argued only the counts based on violations of

Alabama statutes. Thus, they have put squarely in issue the enforceability of the choice of law clause in the agreement.

III.

The only issues before us are those decided by the United States District Court for the Eastern District of Michigan. We have no appellate jurisdiction over decisions of district courts outside the Sixth Circuit. 28 U.S.C. Section 1294; Lewelling v. Farmers Ins. Co. of Columbus, Inc., 879 F.2d 212, 218 (6th Cir. 1989). Because Judge La Plata denied the plaintiffs' motion to retransfer this case to the Northern District of Alabama, however, we have jurisdiction to review that decision as well as the summary judgment and, thus, to review indirectly the

decision of Judge Acker.

A.

Our analysis begins with an evaluation of the transfer issue, but we must recognize from the outset that the resolution of this issue should not be outcome determinative because of the presence of the choice of law clause. That clause states that the agreement itself as well as its construction "shall be governed by the laws of the State of Michigan." In a diversity action such as this, the courts of Alabama and Michigan, applying Michigan law under the governing law clause, should reach identical results on the substantive issues involved in the case. Cf. Guaranty Trust Co. v. York, 326 U.S. 99, 100 (1945); Stewart Organization, Inc. v. Ricoh, supra, 810

F.2d at 1070. Because the forum selection clause and its enforceablity under 28 U.S.C. Section 1404(a)[2] we are concerned only with such questions as whether consideration of convenience to parties and witnesses and other burdens associated with proceeding in the agreed jurisdiction render enforcement unreasonable under the circumstances.

Although forum selection clauses were once disfavored by the courts, that is no longer the case. At least since the Supreme Court's decision in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), such clauses are "prima

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[2]Section 1404(a) provides:

Section 1404. Change of Venue
(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." Id. at 10 (footnote omitted). Since its decision in The Bremen, the Supreme Court has provided further guidance on the enforcement of a contractually pre-selected forum where one party is attempting to enforce that choice through a motion to transfer under 28 U.S.C. Section 1404(a). In Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22 (1988), the Court held that when a district court is considering a motion to transfer based upon a forum selection clause, the clause "should receive neither dispositive consideration...nor no consideration... but rather the consideration for which Congress

provided in Section 1404(a)." Id. at 31. The Supreme Court pointed out that in addition to the forum selection clause, which is "a significant factor that [should figure] centrally in the District Court's calculus," the lower court should consider a number of other case-specific factors. Id. at 29. These factors are derived from the explicit wording of the statute, and can be distinguished on the basis of the interest which they affect. Therefore, in ruling on a motion to transfer under Section 1404(a), a district court should consider the private interests of the parties, including their convenience and the convenience of potential witnesses, as well as other public-interest concerns, such as systemic integrity and fairness, which come under the rubric of

"interests of justice." Id. at 30.

Because this case involves the successive rulings by coordinate courts in the same case, our analysis is further guided by the doctrine of the law of the case. This doctrine states that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Arizona v. California, 460 U.S. 605, 618 (1983). Because of the possibility of forcing a transferred case into perpetual litigation by playing "jurisdictional ping-pong," the law of the case doctrine applies "with even greater force to transfer decisions than to decisions of substantive law." Christianson v. Colt, 486 U.S. 800, 816 (1988). Nevertheless, the law of the case doctrine is a rule

of judicial comity rather than one of jurisdictional limitation:

> A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe do do so in the absence of extraordinary circumstances such as where the initial decision was "clearly erroneous and would work a manifest injustice." Arizona v. California, supra, 460 U.S., at 618, n. 8,, 103 S.Ct., at 1391, n. 8 (citation omitted).

Christianson v. Colt, supra, 486 U.S. at 817. In clarifying the circumstances under which a judge rightfully departs from the law of the case, Judge Friendly wrote in Fagel v. Chestnutt, F.2d 100 (2d Cir. 1981), cert. denied, 459 U.S. 828 (1982), "The law of the case will be disregarded only when the court has 'a clear conviction of error' with respect to a point of law on which its previous decision was predicated." Id. at 109.

Consequently, law of the case does not limit a court's power to make an independent decision; rather it "directs a court's discretion." Arizona v. California, supra, 460 U.S. at 618; accord Skil Corp. v. Millers Falls Co., 541 F.2d 554, 558-59 (6th Cir.), cert. denied, 429 U.S. 1029 (1976). Given this framework, we must decide whether Judge La Plata, in adopting Judge Acker's transfer decision as the law of the case, abused his discretion.

B.

The plaintiffs argued to Judge La Plata in their motion for retransfer that Judge Acker's transfer order should not be adhered to as law of the case based on four exceptions to the law of the case doctrine. We conclude that they produced colorable arguments only

in support of their claim of clear error and manifest injustice, and therefore we need not address whether circumstances apart from clear error necessarily furnish grounds for a judge's departure from the law of the case. The plaintiffs asserted clear error in Judge Acker's failure to consider each transfer factor identified by the Supreme Court in Stewart Organization, which, in effect, is an argument that Judge Acker failed to exercise his discretion. Although Judge Acker did not make as thorough an analysis as might be indicated by Stewart Organization, he did respond to the arguments initially relied upon by the plaintiffs. Of course he was acting in light of his court of appeals' mandamus decision in Ricoh and felt compelled to

give strong deference to the form selection clause in the agreement between the plaintiffs and BCE. In reviewing Judge Acker's decision, Judge La Plata examined the record and pertinent authorities and determined that Judge Acker had not committed clear error in construing the Supreme Court's mandate in Stewart Organization an that the transfer decision did not cause manifest injustice. Consequently, although Judge Acker's exercise of his discretion under Section 1404(a) was perhaps overly circumscribed, Judge La Plata correctly adhered to the law of the case in concluding that the decision to transfer was not clearly erroneous.

Judge La Plata then turned to the new arguments raised by the plaintiffs in their motions for reconsideration an

for retransfer. After examining the record, he found none of these arguments persuasive. He dealt at some length with the most serious of these arguments - that the forum selection clause was "nullified" by the plaintiffs' claims of fraud, deceit and misrepresentation. In rejecting this contention, the court followed settled law that unless there is a showing that the alleged fraud or misrepresentation induced the party opposing a forum selection clause *to agree to inclusion of that clause* in the contract, a general claim of fraud or misrepresentation as to the entire contract does not affect the validity of the forum selection clause. See Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 n.14 (1974) (The Supreme Court in The Bremen v. Zapata did not hold that any

time a dispute arising out of a transaction is based on fraud that the forum selection clause in an agreement in unenforceable. "Rather, it means that an arbitration or forum-selection clause in a contract is not enforceable if the *inclusion of that clause in the contract* was the product of fraud or coercion.")

As this court has stated, there must be a well-founded claim of fraud in the inducement of the clause itself, *standing apart from the whole agreement*, to render an arbitration clause unenforceable. Arnold v. Arnold Corp., 920 F.2d 1269, 1278 (6th Cir. 1990). Both Scherk and Arnold dealt with arbitration clauses, which are a particular type of forum selection clause. Both opinions applied the rule

to arbitration clauses and general forum selection clauses alike. When pled generally, claims of fraud, deceit and misrepresentation do not relate to a forum selection clause. Therefore, Judge La Plata correctly rejected the plaintiffs' argument that their general allegations of fraud, deceit and misrepresentation nullified the forum selection clause.

C.

The plaintiffs' arguments that Judge Acker should have declined to transfer the case to prevent manifest injustice are not persuasive.

Almost inevitably there is some disparity of economic power between franchisor and franchisee. Nevertheless, the record does not contain the picture of totally

unsophisticated and inexperienced persons accepting every condition imposed by a franchisor. Johnny Moses had both undergraduate and graduate degrees, and studied economics at both levels. In addition, his employer had sent him to a workshop in advanced management skills. Frances Moses was also a college graduate and a former school teacher with experience in the real estate business.

The plaintiffs filed a financial statement with Mr. Moses's deposition dated June 7, 1988, which showed that they owned securities and investment real estate in addition to their home and tangible personal property. The plaintiffs had "looked at" other franchises before deciding on BCE as an investment. They talked with an advisor

and investigated both Holiday Inn and Kentucky Fried Chicken franchises before settling on BCE. Most telling, however, is the fact that BCE did not present them with a franchise agreement on a "take-it-or-leave-it" basis. It is clear from both plaintiffs' depositions that they negotiated various items with the defendant Petress, an prevailed in seeking changes in the franchise agreement first presented to them.

With respect to the claim of financial hardship, the record discloses that the plaintiff' attorney took their case on a contingent fee basis after the payment of an initial retainer. Mr. Moses was unable to estimate how much more it would cost to try the case in Michigan than in Alabama. There is no reason why the testimony of witnesses

could not be presented by deposition. Of course, the plaintiffs rather than the defendants would be required to bear the expense of travel. This is inherent in a forum selection clause. Unless all parties reside in the selected jurisdiction, any litigation will be more expensive for some than for others. This is not a reason for declaring such clauses invalid.

This record lacks the elements required to create a "clear conviction of error" in Judge Acker's application of the law of the case and decision to transfer the case pursuant to Section 1404(a). Fogel v. Chestnutt, supra. Judge La Plata did not commit reversible error in denying the motion to retransfer.

IV.

In granting summary judgment for the defendants, the district court held that the choice of law clause controls. We agree. Both Alabama and Michigan conflict of law rules recognize the enforceability of choice of law provisions in their courts if otherwise valid and not contrary to the public policy of the forum state. Craig v. Bemis Co., Inc., 517 F.2d 677, 680 (5th Cir. 1975) (Alabama law); New England Mut. Life Ins. Co. v. Gray, 786 F.2d 406, 411 (6th Cir. 1986) (Michigan law). Michigan clearly has sufficient contacts with the franchise agreement for Michigan law to be applied in accordance with the parties' agreement. The only question, then, is whether it offends the public policy of Alabama for

this case to be decided by the application of Michigan substantive law.

Alabama courts have stated that the test is "whether the public interest is injuriously affected in such substantial manner that private rights and interests should yield to those of the public." Colston v. Gulf States Paper Corp., 291 Ala. 423, 2182 So.2d 251, 255 (1973) (citation omitted). The courts move cautiously when asked to hold contract clauses unenforceable on public policy grounds; this should occur only in cases where there is "a dominating public interest." Lowery v. Zorn, 243 Ala. 285, 9 So.2d 872, 874 (1942).

We can find no such dominating public interest of Alabama that would be contravened by permitting the dispute in this case to be resolved under the law

of Michigan. The plaintiffs argue that Alabama law permits the recovery of punitive damages for fraud or misrepresentation whereas the law of Michigan does not. This was the state of the law when the plaintiffs entered into the contract, and yet they agreed that Michigan law should control any disputes. They cite no case in which it has been held that a state's dominating public interest is violated by requiring its citizens and residents to try a lawsuit in another jurisdiction with a different rule on punitive damages where the parties have agreed that the other state's substantive law is controlling.

The plaintiffs repeat their arguments made with reference to the forum selection clause--that the alleged fraud vitiates the choice of law

clause. We believe the answer is the same in both instances. The complaint makes only general allegations concerning fraud in the inducement, and none is specifically related to the choice of law clause. Johnny Moses admitted that he read and was aware of the clause. As the defendants point out, the plaintiffs produced no authority in support of their claim that such a general claim, without more, can lead to a holding that a choice of law clause is unenforceable. Comment to the Restatement (Second) Conflict of Laws Section 201(1971) states that enforcement of a choice of law provision will be denied, in the face of a claim that a contract was entered into by reason of misrepresentation, undue influence or mistake, "only if the

misrepresentation, undue influence or mistake was responsible for the complainant's adherence to the provision." This statement is reflected in the cases previously discussed with respect to the forum selection clause.

Finally, the plaintiffs assert that the choice of law clause applies only to construction of the contract itself and not to their claims of fraud and misrepresentation. The pertinent language is, "This Franchise and License Agreement and the construction thereof shall be governed by the laws of the state of Michigan...." Clearly, the clause refers to more than construction of the agreement; otherwise the first six words would be surplusage. If the clause provided merely that its construction would be governed by the

law of Michigan, the plaintiffs would have support for their argument that it does not apply more generally. In Caton v. Leach Corp., 896 F.2d 939 (5th Cir. 1990), the choice of law clause provided that "[t]his agreement shall be construed under the laws of the State of California." The court held that "[t]he parties' narrow choice of law clause does not address the entirety of the parties' relationship," and thus did not apply to the plaintiff's tort claims. Id. at 943. The court contrasted the narrow clause in that case with an example of broader language, "govern, construe and enforce all of the rights and duties of the parties arising from or relating in any way to the subject matter of this contract." This language would cover more than pure contract

claims. Id. n. 3. The language in the present case falls between these extremes.

The plaintiffs are not asserting a non-contractual claim or one that arose incidentally out of the contractual relationship. Rather, they are seeking to avoid enforcement of the contract itself. They put the validity of the contract in issue, and such a claim would appear to be encompassed by the language, "This Franchise and License Agreement ... shall be governed by the laws of the State of Michigan." In the absence of any showing to the contrary, we find no error in the district court's determination that the law of Michigan governed this case. To the extent the plaintiffs based their claims directly on the alleged violations of specified

Alabama statutes, without reference to the law of Michigan, they failed to assert a claim upon which relief could be granted. The defendants were entitled to judgment on those claims as a matter of law. The plaintiffs originally asserted a common law conspiracy claim, which the district court denied. The plaintiffs have abandoned this claim on appeal.

CONCLUSION

After reviewing each ruling by the Michigan district court, we find no clear error of law or abuse of discretion in denial of the plaintiffs' motion to retransfer the case to the Alabama court or in entry of summary judgment for the defendants.

The judgment of the district court is affirmed.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

WALTER H. STEWART,
ET AL., ETC.,

Plaintiffs

CIVIL ACTION

NO. 89-AR-0871-S

VS.

DEAN-MICHAELS
CORPORATION, ETC.,

Defendant

CIVIL ACTION

JOHNNY W. MOSES,
ET AL.

NO. 88-AR-1745-S

Plaintiff,

VS.

BUSINESS CARD EXPRESS,
INC.,ET AL.,

Defendant

---/

MEMORANDUM OPINION

Although the above-two entitled cases have not been consolidated, the issue to be decided is virtually identical in both cases, and the

rationale in one case is so outcome-determinative in the other that the court has chosen to write one opinion for both. Because of the fast-growing use of forum selection clauses, the only surprising thing is that there are only two such cases before this court. In both cases, the court has for consideration a defendant's motion to dismiss or to transfer to another forum pursuant to 28 U.S.C. Sections 1404(a) and/or 1406(a). The parties in both cases have sought and obtained extensions of the periods of time for discovering evidence bearing on the forum non conveniens issues. There also have been heated disputes in both cases over various aspects of this discovery. These disputes do not seem to be subsiding. Because the court is

satisfied that all of the discovery in the world will not change the lesson taught by the Eleventh Circuit in In re Ricoh Corporation, 870 F.2d 570 (11th Cir. 1989), and that the expense being incurred by plaintiffs is a waste of money they will need to travel to the proper forums, the court will vacate all discovery extensions previously granted, and will order discontinued the ongoing discovery on the venue question, that is, unless a transferee court should reopen such discovery for reasons of its own.

Both cases were filed in this court by Alabama plaintiffs against non-resident defendants. In somewhat of an irony, Walter H. Stewart, the lead plaintiff in CV 89-AR-0871-S, is the president of The Stewart Organization,

Inc., famous as the plaintiff in what has become the leading case, Stewart Organization, Inc. v. Ricoh Corp., 779 F.2d 643 (11th Cir. 1986); Stewart Organization, Inc. v. Ricoh Corp., 810 F.2d 1066 (11th Cir. 1987) (en banc); Stewart Organization, Inc. v. Ricoh Corp., ____U.S.____, 108 S.Ct. 2239 (1988); Stewart Organization, Inc. v. Ricoh Corp., 696 F. Supp. 583 (N.D. Ala. 1988); In Re Ricoh Corporation, 870 F.2d 570 (11th Cir. 1989); and Stewart Organization, Inc. v. Ricoh Corp., ____F. Supp .____, 1989 WL 71083 (N.D. Ala. June 16, 1989).

As he was in In Re Ricoh Corporation, Mr. Stewart is here confronted by a forum selection clause contained in a contract which he and his fellow plaintiffs signed. This clause

in the contract between plaintiffs in CV 89-AR-0871-S and defendant, Dean-Michaels Corporation which is located in Ithaca, New York, says:

> This agreement shall in all respects be governed by the laws of the State of New York (U.S.A.). The parties hereby agree that any dispute relating to the services sold hereunder shall be subject to the jurisdiction of the courts within the State of New York.

Dean-Michaels first contends that this court lacks in personam or "long arm" jurisdiction. With this contention the court disagrees, but the dispute over personal jurisdiction becomes academic in view of the transfer option presented by 28 U.S.C. Sections 1404(a) and 1406(a), and Bentz v. Recile, 778 F.2d 418 (5th Cir. 1985).

In CV 88-AR-1745-S, Johnny W. Moses

and his fellow plaintiffs, as do Mr. Stewart and his fellow plaintiffs in CV 89-AR-0871-S, seek to sue on their home ground, Alabama, but they run into the following forum selection clause in the contract out of which a franchise relationship between them and defendant, Business Card Express, Inc., was born:

> Both parties acknowledge all litigation must be commenced in the federal district court for the Eastern District of Michigan or the Michigan Circuit Court for the County of Oakland.

Fortunately or unfortunately, this court knows as much about Stewart Organization v. Ricoh Corporation in its various manifestations, and in the different courts which have dealt with it over the years, as any district court in the United States. This court has

learned a hard but a thoroughly-learned lesson from the most recent manifestation and most important court, the Eleventh Circuit's In re Ricoh Corporation.

Plaintiffs in both of these cases understandably have spent their efforts desperately attempting to distinguish their cases from In re Ricoh Corporation, in which the Eleventh Circuit unequivocally ordered this court to transfer Stewart Organization's action from this court to a forum that it arguably had participated in selecting in advance by contract. Plaintiffs here strive to convince this court that they come within some exception recognized by the Eleventh Circuit in In re Ricoh Corporation. Not having been told by the Eleventh Circuit

what, if any, exceptional circumstances would justify choosing a forum other than the forum provided in a forum selection clause, this court is unconvinced that either set of plaintiffs comes within any exception.

It does no good, but hopefully will do no harm, for this court to agree with plaintiffs in both case that the Eleventh Circuit misread the Supreme Court's Stewart Organization, Inc. v. Ricoh Corp., ____U.S.____, 108 S.Ct. 2239. Instead of recognizing a forum selection clause as only one fact, among others, to be weighed by the trial court, as the Supreme Court held, the Eleventh Circuit has, as a practical matter, made the clause the overriding consideration. It became the controlling criterion because there was

nothing recognized which can outweigh it. The mere fact that the Eleventh Circuit has misread the Supreme Court, if it has, does not give any district court in Alabama, Florida or Georgia, much less this court, the right to deviate from the Eleventh Circuit's unmistakable interpretation of the Supreme Court. It is the Eleventh Circuit's understanding of the Supreme Court, and not this court's understanding of the Supreme Court, that guides this court. In In re Ricoh Corporation, the writ of mandamus issued to this court was based on a finding that all of this court's various specific findings of fact that this court thought were pertinent under 29 U.S.C. Section 1404(a) were inconsequential in view of the

insurmountable burden of proof placed on Stewart Organization by the forum selection clause it had executed as part of its contract. With the ink hardly dry on the Eleventh Circuit's writ directed to this court, this court would be both foolish and foolhardy not to follow the unmistakable direction in which it was pointed. It follows that it can be only of academic interest that this court joins plaintiffs in acknowledging the logic of courts which have most recently spoken on this same subject, in the following cases:

Cheever v. Academy Chicago, Ltd., 690 F. Supp. 281 (S.D. N.Y. 1988).

Red Bull Assoc. v. Best Western Int'l, Inc., 686 F. Supp. 447 (S.D. N.Y. 1988).

Fibra-Steel, Inc. v. Astoria Indus., Inc., 708 F. Supp. 255 (E.D. Mo. 1989).

Heller Financial, Inc. v. Riverdale Auto Parts, Inc., ____F. Supp.____, 1989 WL 57705 (N.D. Ill. March 31, 1989).

Polsky v. Hall City Centre Assoc., ____F. Supp.____, 1989 WL 48109 (E.D. Pa. May 4, 1989).

Van's Supply & Equip. v. ECHO, Inc., 711 F. Supp. 497 (W.D. Wis. 1989).

All of these district courts refused to be "ring-nosed" by a forum selection clause where, after considering all of the facts, they found a forum substantially more convenient and fairer to plaintiffs or to defendants than the one contained in the contract. However, none of these decisions can provide succor to the plaintiffs in these two cases. In re Ricoh Corporation is too overwhelming.

Mr. Moses, et al., in CV 88-AR-1745-S, challenge the validity vel non of the clause itself, and, on this basis, they

attempt to distinguish their case from In re Ricoh Corporation. This court does not believe that the Eleventh Circuit could be persuaded by such a distinction when it was unpersuaded in In re Ricoh Corporation by the fact that the very last agreement between Stewart Organization and Ricoh Corporation may not even have contained a forum selection clause. Mr. Moses, et al., make a valid point, but one which is unavailing, when they refer to the Federal Trade Commission's pre-Stewart Organization expression of concern over the usual imbalance of bargaining power in the franchisor-franchisee relationship, such a concern that the FTC succeeded in requiring Firestone Photographs, Inc., to notify all of its franchisees that it will not attempt to

enforce the contractual provisions which limits suits against it to the courts of Ohio. See Firestone Photographs, Inc., 1978 F.T.C. Complaints and Orders (CCH) Paragraph 21,389 (Apr. 20, 1978).

In In re Ricoh Corporation, the Eleventh Circuit found that this court "clearly abused its discretion" in not deferring to the forum selection clause. In re Ricoh Corporation, 870 F.2d at 573 (emphasis supplied). In England v. ITT Thompson Indus., Inc., 856 F.2d 1518 (11th Cir. 1988), the Eleventh Circuit recognized that "trial judges are permitted a broad discretion in weighing the conflicting arguments as to venue." Id. at 1520. In In re Fink, 876 F.2d 84 (11th Cir. 1989), the Eleventh Circuit said:

> Mandamus is not a substitute for appeal; it is available only in exceptional cases, where there is a "clear abuse of discretion or 'usurpation of judicial power.'"

Id. at _____(citations omitted) (emphasis supplied).

These clear, recent Eleventh Circuit expressions make all the more pregnant with meaning the Eleventh Circuit's grant of mandamus directed to this court in In re Ricoh Corporation and its finding that this court "clearly abused its discretion." Although this court weighed all of the traditional forum non conveniens factors in order to arrive at its erroneous conclusion that Alabama was the more convenient forum, in final analysis it turned out that the forum selection clause pointed out the proper forum. It is clear, then, that the Eleventh Circuit is committed to the

effectuation of "contracted-for" forum choices in all but exceptional cases, without describing an exceptional case. This court chooses not to try to chip away at the reinforced concrete of In re Ricoh Corporation. A "2 x 4" between the eyes is an attention-getter. Therefore, despite what both sets of plaintiffs now argue in these cases, this court does not believe that the Eleventh Circuit left open any room for arguing the nice distinctions they attempt to argue.

Furthermore, there is no reason for this court to revisit Alabama's public policy, reconfirmed by the Supreme Court of Alabama recently in Keelean v. Central Bank of the South, ___So. 2d___, 1989 WL 52063 (Ala. April 7, 1989), in which the Alabama court adhered to

Redwing Carriers, Inc. v. Foster, 382 So. 2d 554 (Ala. 1980), although a concurring justice there recognized the existence of Stewart Organization v. Ricoh Corp. True, if these plaintiffs had filed their actions in an Alabama state court, and if defendants had not removed them to federal court on the ground of diversity, the cases would have remained in Alabama for trial. The difference between the criteria for a determination of proper venue in an Alabama court and the criteria in a federal court in Alabama is both dramatic and traumatic, but it is very real.

Plaintiffs in these two cases also seem to suggest that this court should deny transfer because it would not expose itself to an interlocutory review

of that denial by the Eleventh Circuit in light of Lauro Lines v. Chasser, ____U.S.____, 109 S.Ct. 1976 (1989), which was decided after In re Ricoh Corporation. This court is not tempted. When this court refused to certify an interlocutory appeal in Stewart Organization, Inc. v. Ricoh Corp., CV 84-AR-2460-S (N.D. Ala. Oct. 27, 1988), this court may have accidentally predicted Lauro Lines, but the Eleventh Circuit's recent order to this court to transfer the case to New York arrived in the mail just the same. See In re Ricoh Corporation., 870 F.2d at 572 n. 4.

Under the circumstances, this court sees little reason to comment upon or to analyze the various rather obvious facts presented by plaintiffs and that

militate toward Alabama as the more convenient forum in both of these case. Plaintiffs in both cases, while differing in some respects from each other, have presented impressive pro-Alabama-forum facts, such as the locations of witnesses, the relative financial abilities of plaintiffs and defendants, and the dominance of one party over the other in negotiating the contract. In CV 88-AR-1745-S, defendant Business Cards Express, Inc., is not the only defendant. Mr. Moses, et al., also argue that the forum selection clause should not control the forum when they are suing parties who were not parties to the contract as well as a party to the contract. If Mr. Moses, et al., had not sued Business Card Express, Inc., and had only sued individuals who did

not sign the contract, this distinction might be one to take their case out of the tight embrace of In re Ricoh Corporation. Neither does the mere fact that Mr. Moses, et al., were pathetically unsophisticated, first-time franchisees when they went into business in Alabama with Business Card Express, Inc., provide a route of escape from In re Ricoh Corporation, which recognizes no such exception. Mr. Moses, et al., rely on Sorrells Steel Corp. v. Great Southwest Corp., 651 F. Supp. 623 (S.D. Miss. 1966), for the proposition that the relative financial strengths of the parties is a proper factor to be considered in making a transfer decision under Section 1404(a), but Business Card Express, Inc., correctly points out that in Sorrells there was no forum selection

clause by which a financially strained plaintiff (like Stewart Organization) had signed away in advance the possibility of litigating in a more economically feasible forum. The court regrets the fact that Mr. Moses, et al., will not only be inconvenienced by having to go to Michigan, but will, in all likelihood, be financially unable to do it. There is no doubt that the order transferring CV 88-AR-1745-S to Michigan will, as to Mr. Moses and his partners be like transferring them to the moon or to the bankruptcy court.

Lastly, the Eleventh Circuit draws no meaningful distinction, as Mr. Stewart would suggest, between a so-called exclusive forum clause and a clause which simply designates the proper forum. Therefore, Mr. Stewart's

reliance on Docksider, Ltd. v. Sea Technology, Ltd., 875 F.2d 762 (9the Cir. 1989), will only help Mr. Stewart if he finds himself in the Ninth Circuit under similar circumstances.

Conclusion

If this court were capable of persuasively distinguishing, with intellectual honesty, either or both of these case from In re Ricoh Corporation, it would make the effort. Although this court has carefully studied the materials furnished by plaintiffs, this court has carefully studied the materials furnished by plaintiffs, this court lacks the capability of making any distinction that would withstand appellate scrutiny under the glare of In re Ricoh Corporation. The Eleventh Circuit simply nailed the lid too

tight. This court lacks the inclination, much less the power, to overrule the Eleventh. This court is honest in saying that were it not for In re Ricoh Corporation, this court would deny both motions to transfer. Whether the federal courts in New York and/or Michigan will feel bound to follow In re Ricoh Corporation, or will take an independent look at the venue question, is a matter for them and not for this court.

In CV 89-AR-0781-S, the forum selection clause which Mr. Stewart signed does not designate, as the clause did in Stewart Organization, Inc. v. Ricoh Corp., the precise location or name of the court within the State of New York where he must litigate. Dean-Michaels, which has here invoked the

forum selection clause, and which probably drafted it, can only use it to force a transfer to one of "the courts within the State of New York." Dean-Michaels is located. Manhattan is 250 miles closer to Alabama than Ithaca is, so the court will, to the extent of 250 miles, construe the clause in favor of plaintiffs, who, together with most of their witnesses, live in Alabama. This may save them a few dollars, although the transfer to the Southern District of New York may be temporary. Mr. Stewart and his Stewart Organization will, at least for a short while, have cases running in tandem in Manhattan, thus perhaps ameliorating the economic sting occasioned by In re Ricoh Corporation.

Dean-Michaels can, of course, move the Southern District of New York for a

transfer to Ithaca, while Mr. Stewart, et al., can move for a re-transfer to Birmingham. Fun for everyone! In Union Tank Leasehold Bldg. Co. v. DuPont Glore & Forgan, Inc., 494 F. Supp. 514 (S.D. N.Y. 1980), the United States District Court for the Southern District of New York re-transferred to the United States District Court for the Northern District of Illinois a case which the latter court had transferred to the former pursuant to Section 1404(a), finding the original transfer to have been erroneous. This is an infrequent procedure because "it is usually more efficient to accept the decision of the transferor court and get on with the case." 1B Moore's Federal Practice, Paragraph 0.404[8] (2d ed. 1988).

The fact that district courts in

Alabama, Georgia and Florida can now routinely close their files in many difficult commercial cases as a direct result of In re Ricoh Corporation, while these same court files are contemporaneously opened by federal courts in New York, Michigan, or elsewhere, may create tension between regions, but if it becomes a growing problem it is not one of this court's making. I may eventually require corrective action by Congress or a second clarification of the effect of a forum selection clause by the Supreme Court. Until something is done, the federal courts in Alabama, Georgia and Florida predictably will unload from their dockets all controversies in which the litigants, or some of the, have, by

contract, picked some non-Eleventh Circuit state as the forum which the parties have chosen.

If this court has sounded daunted by In re Ricoh Corporation, it is only because it is daunted! Any tendency toward quixotism this court might have has been at least temporarily smothered. When this court read In re Ricoh Corporation, it heard the Eleventh Circuit say "check" and "mate." That binding appellate statement is simply being here passed along to Mr. Stewart, et al., and to Mr. Moses, et al.

By separate orders, this court will transfer these two cases, to New York and to Michigan, respectively, bidding them both a fond farewell.

DONE this _____ day of July, 1989.

_____

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
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No. 90-1933

In The

Supreme Court of the United States

October Term, 1991

JOHNNY W. MOSES, *et ux., et al.*,

Petitioners,

v.

BUSINESS CARD EXPRESS, INC., *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit properly held that the United States Court for the Eastern District of Michigan was not clearly erroneous in granting Summary Judgment in favor of Respondents because the mutually negotiated choice of Michigan law clause contained in the Franchise and License Agreement dictated that Michigan law governed claims relating to alleged fraud and misrepresentation in connection with Petitioners' execution of such Agreement.

2. Whether this Court can review a decision issued by the United States District Court for the Northern District of Alabama.

3. Whether the United States Court of Appeals for the Sixth Circuit properly affirmed the application of the law of the case doctrine by the United States District Court for the Eastern District of Michigan in denying Petitioners' motion to re-transfer this case back to the United States District Court for the Northern District of Alabama, which previously transferred the case, pursuant to 28 U.S.C. § 1404(a).

LIST OF PARTIES

The parties before the Court and to the proceedings below before the United States Court of Appeals for the Sixth Circuit are respondents Business Card Express, Inc., Gregory Derry, Dennis Phillips, American Speedy Printing Centers, Inc. and Andrew Petress and petitioners Johnny W. Moses, Frances G. Moses and J & F Enterprises, Inc.

The corporate respondents state that they have no parent companies or subsidiaries to list pursuant to Rule 29.1.

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28 U.S.C. § 1404(a) 5, 6, 7

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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STATEMENT OF THE CASE

The essence of this case revolves around Petitioners' attempt to avoid the application of mutually negotiated choice of law and choice of forum clauses in the Franchise and License Agreement ("Agreement") between Respondents and Petitioners, which state:

> This Franchise and License Agreement and the construction thereof shall be governed by the laws of the State of Michigan. . . . Both parties acknowledge all litigation must be commenced in the Federal District Court of the Eastern District of Michigan or the Michigan Circuit Court for the County of Oakland.

Respondents adopt the statement of the case contained in Sections I and II of the Opinion.[1]

SUMMARY OF THE ARGUMENT

The decision of the Court of Appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The outcome of this case rested solely on the trial court's construction of a particular contractual choice of law clause and, consequently, a decision by this Court would have extremely limited, if any, precedential authority in future cases construing the virtually infinite variations in these clauses. The Petition also inappropriately requests this Court to review the decision of a district court, which is outside of the Sixth Circuit, and clearly outside of the jurisdictional powers of

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[1] Respondents further wish to point out to the Court a misstatement of fact contained in the statement of the case in the Petition. Petitioners assert that on July 12, 1989, when the Northern District of Alabama held that it lacked jurisdiction to decide Plaintiffs' Motion for Reconsideration of the order transferring this case to the Eastern District of Michigan because the files had already been transferred, that the Northern District of Alabama was wrong because the files were "still in the custody of the Alabama District Court Clerk." (Pet. at 7.) Petitioners base this assertion on a docket entry in the Eastern District of Michigan recorded on July 17, 1989 (R. 48) showing a notice of transfer by the Clerk for the Northern District of Alabama. (*See* Reply Brief of Appellants in the Sixth Circuit at 5). The date that the clerk for the Eastern District of Michigan recorded the notice of transfer does not *prove* that the files were not transferred on or before July 12, 1989, as Judge Acker stated. More likely, it merely reflects the time it took for shipment from Alabama to Michigan (which included two weekend days).

this Court, and incorrectly asserts that the transfer order was not reviewed by any court. Accordingly, further review is not warranted.

ARGUMENT

1. Choice of Law Clause. The pivotal issue in this Petition is the choice of law clause. As the panel observed, and petitioners do not dispute:

> We must recognize from the outset that the resolution of this [choice of forum] issue should not be outcome determinative because of the presence of the choice of law clause. That clause states that the Agreement itself as well as its construction "shall be governed by the laws of the State of Michigan." In a diversity action such as this, the courts of Alabama and Michigan, applying Michigan law under the governing law clause, should reach identical results on the substantive issues involved in the case. Cf. *Guaranty Trust Co. v. York*, 326 U.S. 99, 100 (1945); *Stewart Organization, Inc. v. Ricoh, supra*, 810 F.2d at 1070.

(Pet. App. 18a-19a). Thus, even if issues regarding the transfer of this case pursuant to the choice of forum clause discussed below would be alone worthy of certiorari (and Respondents contend that they are not), the presence of the choice of law clause here *a priori* limits this case to the construction of a simple clause in a contract.

The Decision regarding the effect and construction of the choice of law clause was correct and not in conflict with the Fifth Circuit, as Petitioners attempt to argue.

Petitioners seek to have this Court read the choice of law clause, which states "this Franchise and License Agreement *and the Construction thereof* shall be governed by the laws of the State of Michigan . . . ," in a narrow and gerrymandered fashion to "create" a conflict with the Fifth Circuit's decision in *Caton v. Leach Corp.*, 869 F.2d 939 (5th Cir. 1990). In *Caton*, the court held that a choice of law clause stating "[t]his Agreement shall be *construed* under the laws of the State of California" covered only claims which required the *construction* of a contract. *Id.* at 942-43 (emphasis added). The court held that the clause covered claims for breach of contract and for an implied contractual covenant of good faith, and excluded claims for the tort duty of good faith and fair dealing and for restitution under a *quantum meruit* theory, which, the court stated, "[d]id not arise out of a contract." *Id.*

Petitioners erroneously contend that the clause at issue here is "virtually indistinguishable" from the clause at issue in *Caton* (Pet. at 20-21), and would have the clause apply *only* to claims requiring construction of the Franchise and License Agreement. Petitioners clearly ignore the plain wording of the clause. As the Sixth Circuit observed:

> [T]he clause refers to more than construction of the Agreement; otherwise the first six words would be surplusage. If the clause provided merely that the construction would be governed by the law of Michigan, the Plaintiffs would have more support for their argument that it does not apply more generally.

(Pet. App. at 37a-38a). Petitioners' fraud, deceit and misrepresentation claims clearly relate to the "Agreement", even though they may not require *construction* of the

Agreement. Indeed, as the Sixth Circuit observed, Petitioners

> are not asserting a non-contractual claim or one that arose incidentally out of a contractual relationship. Rather, they are seeking to avoid the enforcement of the contract itself. They put the validity of the contract in issue, and such a claim would appear to be encompassed by the language [of the clause]. . . .

(Pet. App. at 39a).[2] Because the Petition ignores the clear wording of the choice of law clause and fails to show any conflict among the courts of appeals interpreting such clauses, and because all courts addressing similar clauses agree with the decision below, the Petition should be denied.[3]

2. Choice of Forum Clause. Petitioners curiously posit most of their argument on the choice of forum clause in the Agreement and the resulting transfer of the case by the Northern District of Alabama to the Eastern District of Michigan, pursuant to 28 U.S.C. § 1404(a).

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[2] *See also Overseas Trading Co. v. United States*, 159 F.Supp. 382, 384 (Ct.Cl.1958) (clause stating that contract is "governed by and construed in accordance with" D.C. law held to cover extra-contractual claims because the phrase "governed by" is "extremely broad in scope"); *Economu v. Borg Warner Corp.*, 652 F.Supp. 1242, 1249 (D.Conn.1987), *aff'd*, 829 F.2d 311 (2d Cir. 1987) (same regarding arbitration clause); *S.A. Mimeracao v. Utah International, Inc.*, 576 F.Supp. 566, 570-573 (S.D.N.Y. 1983), *aff'd*, 745 F.2d 190 (2d Cir. 1984) (same).

[3] Petitioners do not seek certiorari regarding the parties' mutual ability to agree to apply Michigan law or the validity of the choice of law clause itself.

Even if meritorious, issues surrounding the proper application of § 1404(a) to choice of forum clauses are not properly presented here because, as a result of the choice of law clause mandating Michigan law, the outcome in this case would have been the same regardless of the forum. Additionally, Petitioners' arguments are without merit.

First, Petitioners apparently seek to have this Court review the transfer order of the Northern District of Alabama. (Pet. at i-ii, 9-11; Pet. App. 41A-66A). Such review is obviously beyond the jurisdiction of this Court.

Petitioners' next argument is that they were essentially denied the opportunity to have the decision of the Northern District of Alabama reviewed by any court, including the Eleventh Circuit, Eastern District of Michigan or Sixth Circuit. (Pet. at 11-15). This argument is both incorrect and disingenuous. First, Petitioners gave up an opportunity to seek reconsideration by the Northern District of Alabama or review by the Eleventh Circuit because they did not seek a writ of mandamus from the Eleventh Circuit to preserve its jurisdiction by compelling the Clerk for the Northern District of Alabama to request that the files of the case be returned from the Eastern District of Michigan so that the Northern District of Alabama would retain jurisdiction to reconsider the transfer. *See Roofing & Sheet Metal Services, Inc. v. LaQuinta Motor Inns, Inc.*, 689 F.2d 982, 989 n.10 (11th Cir. 1982). Second, contrary to Petitioner's assertions that it has been left in "a judicial limbo" (Pet. at 15), both the Eastern District of Michigan and the Sixth Circuit examined the transfer order of the Northern District of Alabama, guided by "the law of the case" doctrine, under which courts should

refrain from revisiting decisions of a coordinate court, except where the "initial decision was clearly erroneous and would work a manifest injustice." *Christianson v. Colt Indus., Inc.*, 486 U.S. 800, 817 (1988) (law of the case doctrine applies "with even greater force to transfer decisions than to decisions of substantive law").[4] The Eastern District of Michigan held, after reviewing this Court's decision in *Stewart Organization Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), and the related mandamus to the Eleventh Circuit, *In re Ricoh Corp.*, 870 F.2d 570 (11th Cir. 1989), that the Northern District of Alabama's discretionary transfer order pursuant to § 1404(a) was not clearly erroneous. Further, the Eastern District of Michigan considered new arguments, raised only *after* the transfer, and similarly held such arguments did not justify overriding the transfer dictated by the choice of forum clause.[5]

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[4] *See also, Arizona v. California*, 460 U.S. 605, 618 (1983).

[5] Petitioner's discussion of a conflict among the circuits regarding the power of a transferee court to review the decision of a transferor court (which, in fact, is not a true conflict, *see Roofing & Sheet Metal*, 689 F.2d at 987) is spurious. This Court has, in *Christianson*, set forth the standard by which courts in different jurisdictions may revisit transfer orders, *see* 486 U.S. at 816-17 and n.5., and the Eastern District of Michigan and the Sixth Circuit applied this standard in ruling upon Petitioner's Motion for Re-Transfer back to the Northern District of Alabama. The decision by the Eastern District of Michigan that it could not consider Petitioners' Motion for Reconsideration of the transfer thus had no practical impact because the transfer was properly examined through the consideration of Petitioners' Motion for Re-Transfer, which was simply a re-cast version of the Motion for Reconsideration. *See Roofing & Sheet Metal*, 689 F.2d at 989 ("a motion for re-transfer is an appropriate means of preserving for appeal any objection to a transfer between circuits").

This Court need not again review the validity of transfers dictated by choice of forum clauses. In a decision announced this year, *Carnival Cruise Lines, Inc. v. Shute*, ___ U.S. ___, 111 S.Ct. 1522 (1991), this Court thoroughly reviewed the validity of such clauses and came out strongly in favor of enforcing them. This case adds nothing fundamentally new to the rationale employed in *Carnival Cruise Lines*. Additionally this case suffers from numerous infirmities which render it unworthy of certiorari, including Petitioners' failure to seek mandamus from the Eleventh Circuit, the added presence of the salutatory policies of the law of the case doctrine to prevent Petitioners from playing forum "ping-pong", and, most importantly, the presence of the choice of law clause which would render any ruling on the transfer meaningless.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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